DOCUMENT RESUME

ED 134 564 SP 010 748

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TITLE Recent Developments in Equal Employment Opportunity Law and Their Effect on Teacher Credentialling Practices.
PUB DATE Mar 77
NOTE 15p.; Position paper presented at the Annual Meeting of the American Association of Colleges for Teacher Education (29th, Chicago Illinois, March 1-4, 1977); will be included in AACTE 1977 Yearbook

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS Court Litigation; Credentials; Discriminatory Legislation; *Educational Legislation; Employment Qualifications; *Equal Opportunities (Jobs); *Federal Legislation; Performance Based Teacher Education; Racial Discrimination; State Legislation; *State Licensing Boards; *Teacher Certification; Teacher Employment

ABSTRACT

Title VII and Equal Employment Opportunity Commission (EEOC) guidelines on discrimination in employment are not always the basis for court decisions in individual cases where intent to discriminate is challenged. A number of employment discrimination cases over the last decade have invalidated employee selection practices of local school boards and licensing agencies following the guidelines. Applicability of Title VII and EEOC rules to state licensing agencies still has not been definitively resolved by the courts. The consistent invalidation of National Teachers Examination (NTE) as an exclusive employment selection by the courts over the course of the past five years is of great significance to those concerned with the general problem of teacher certification. In recent years, many states have amended their teacher certification regulations to permit or require a Competency Based Teacher Education (CBTE) orientation in their approved program credentialling practices. The educational community should expect direct or indirect judicial application of specific validation standards to teacher credentialling regulations and practices. Licensing and certification authorities will increasingly be directly subjected to validation standards. However, standards are likely to be applied more "flexibly" in court cases dealing with equal employment opportunity issues. Increasingly courts will be requiring adherence to the reform principles that advocates of CBTE have established. (JD)

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ED134564

Position Paper

Michael A. Rebell

29th Annual Meeting

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Recent Developments in Equal Employment Opportunity Law and Their Effect on Teacher Credentialling Practices

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Prepared for the 29th Annual Meeting of the American Association of Colleges for Teacher Education, Chicago, Illinois, March 2, 1977.

Over the course of the past decade, employers throughout the United States, both in the public and private sectors, have increasingly been required by law to demonstrate that the mechanisms they use to select their employees are rational and directly related to the requirements of the particular job. A number of court decisions have specifically held that methods used by local school districts to hire teachers and principals were in violation of applicable constitutional, statutory, and regulatory standards.

I have had occasion in the past to analyze the implications of these developments for state teacher credentialling practices and for the institutions which implement them, especially the state education departments and teacher training institutions.[1] I have consistently advised the educational community to expect direct or indirect judicial application of specific validation standards to teacher credentialling regulations and practices. Recent legal developments substantiate those basic conclusions, but I would now add the following caveat: licensing and certification authorities will increasingly be directly subjected to validation standards, but those standards are likely to be applied more "flexibly" than they have been applied in many previous court cases dealing with equal employment opportunity issues.

Title VII and the EEOC Guidelines

In order to put into proper perspective the major legal developments to which I am referring (mainly the Supreme Court's decision in *Washington v. Davis* and the recently promulgated Federal Executive Agency Guidelines), it is necessary to discuss briefly Title VII of the Federal Civil Rights Act of 1964. Title VII prohibits employers from discriminatory practices in their hiring policies. Originally, employees of private educational institutions and of state and local governmental agencies, including school districts, were exempted from the protection of the Act. In 1972, however, most of these exemptions were abolished, and school district employees were henceforth to be covered by the antidiscrimination mandates of the law.

Pursuant to its powers under 42 U.S.C. §2000e-12, the Equal Employment Opportunity Commission (EEOC) has promulgated certain "Guidelines on Employee Selection Procedures" (29 C.F.R. Part 1607) to regulate its administration of the Act. Under these guidelines, EEOC has established detailed validation standards for tests and all "performance measure[s] used as a basis for any employment decision." The law and the guidelines do not, of course, ban the use of ability tests and other employment selection devices, so long as these mechanisms are shown to be rational and "job-related."

In scrutinizing the validity and "job-relatedness" of employment selection devices which are challenged as being discriminatory, the EEOC guidelines refer to two main methods of acceptable validation, namely "criterion validation" and "content validation."[2] Criterion validation (also often referred to as predictive validation) is the higher standard, which is normally required of all employees. Stated simply, it means that if an employer utilizes, for example, a written test as a basis for hiring, he or she must demonstrate that such a test is a valid indicator of actual competence on the job. He/she must show that those who pass the test, and those who receive higher grades on the test, perform better on the job than those who fail the test or obtain lower grades. In other words, he/she must empirically demonstrate that this test validly predicts competence on the job. To establish such predictive validation obviously is a very complicated, time-consuming, and expensive process.

Although predictive validation is the preferred standard, the EEOC guidelines permit the use of "content validation" where predictive validation is presently "not feasible." Content validation aims at the same general result as predictive validation, i.e., assurance that the test is an accurate measure of competence on the job. But, instead of requiring empirical predictive correlations, content validation requires the employer to show that the content of his/her test, on its face, is rationally related to the specific descriptions of the job which the employer has promulgated. For example, if a test is given for a position such as speech teaching, wherein most of the person's performance will depend on verbal abilities, a test which has one question involving verbal facility and 99 questions asking for familiarity with famous authors of English literature would not satisfy content validation

requirements because the person is being tested for something that is not related to the actual demands of the job.

Even though the validation standards promulgated by the EEOC were more detailed and exacting than the general antidiscrimination pronouncements enacted by Congress in the Title VII statute, and even though the EEOC standards were promulgated as "guidelines" and were therefore technically not full federal regulations, the United States Supreme Court, in two landmark decisions in this area *(Griggs* and *Albemarle),*[3] adopted and enforced the specific provisions of the guidelines and virtually gave them the effect of law.

Title VII and the EEOC guidelines may be applied directly to specific hiring practices only if there is a showing of discrimination limiting the employment opportunities of racial, religious, sexual, or ethnic minority groups. However, under Title VII, "adverse impact" sufficient to trigger application of the job validation standards can be shown by statistical indications that the minority group applicants are rejected by the employment selection device on a disproportionate basis, as compared with other applicants. In other words, it is not necessary to show that the employer actually *intended* to discriminate, if the job selection practices have an adverse impact on minority applicants. Title VII, therefore, has had a substantial effect on employment practices throughout the United States, both because of the rigorous predictive and content validation standards imposed by the EEOC, and because of the more easily satisfied definition of discrimination in terms of adverse impact.

As I mentioned earlier, prior to 1972, Title VII and the EEOC guidelines applied basically only to private companies because state and local governmental agencies were specifically exempted from the Act. However, in cases filed prior to 1972 against public employers, although the challenge would initially be brought on general equal protection grounds under the Fourteenth Amendment, the plaintiffs would generally refer "indirectly" to the EEOC guidelines. They would argue that, although technically the guidelines are not binding in the particular case, the EEOC, the expert agency in the employment discrimination area, has devised methods for assessing discrimination by employers; and it would be reasonable for a Court to utilize the Commission's expertise and experience in interpreting general constitutional doctrines when applied to similar circumstances involving public employers. Thus, the EEOC guidelines came to be "indirectly applied" in public employer cases brought on general constitutional grounds.[4]

The Supreme Court's Decision in Washington v. Davis

The United States Supreme Court's main concern in its decision in the widely publicized case of *Washington v. Davis,*[5] decided on June 7, 1976, was to reject this prevalent understanding and to state clearly that Title VII standards and the EEOC guidelines should *not* be applied in cases brought under general constitutional precepts. The Supreme Court's holding on this point was rather extraordinary, not only because it reversed a practice that had been almost uniformly adopted by the lower federal courts, but also because the issue had not even been raised by the appellants in the case;

they had assumed the applicability of the Title VII standards in their arguments.

A further puzzling point about the Court's decision in *Washington* is the fact that it was somewhat anachronistic: because Title VII has been directly extended to public employers since 1972, virtually all cases filed since that time have included both a specific Title VII claim and a general constitutional claim. Therefore, the holding that Title VII standards should not be indirectly applied in a case like *Washington*, which was originally filed in 1970, will have little bearing on current and future cases to which Title VII directly applies.

Why then did the U.S. Supreme Court go out of its way to hold that Title VII standards should not be applied in constitutional cases, even though the Court clearly realized that its decision would have little direct bearing on future employment discrimination cases? The answer, I think, is that the Court was concerned with the precedent that was being established in constitutional employment discrimination cases, a precedent which might increasingly be applied to other areas of constitutional litigation. The Court's key concern was with the extension of Title VII's definition of discrimination in terms of "adverse impact":

> [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. . . .
>
> A rule that a statute designed to achieve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.[6]

In other words, although Congress is free to define discrimination in terms of adverse impact in its statutes, the Court did not believe that the Fourteenth Amendment of the Constitution historically had been, or should now be, interpreted to hold public officials responsible for adverse impacts of their actions on minority groups if there had been no showing of actual discriminatory intent.[7] Acceptance of such a principle in constitutional employment discrimination cases might have broad and unforeseen consequences in a wide range of other areas of potential claims under the equal protection clause.

I mentioned earlier that in the *Griggs* and *Albemarle* decisions, the U.S. Supreme Court had previously adopted and fully enforced the EEOC guidelines in Title VII cases. In *Griggs*, the Court had specifically held that an employment practice which had an "adverse impact" on Blacks was illegal even though there was no showing of discriminatory intent—in other words, under Title VII the Court strongly enforced the result that it was unwilling to enforce as a constitutional matter in *Washington v. Davis*. General language in *Washington*, and specific statements of at least two concurring

justices in *General Electric v. Gilbert*, 45 U.S.L.W. 4031 (Dec. 7, 1976), indicate that the Supreme Court is still committed to its basic holdings in *Griggs* and *Albemarle* and that the decision in *Washington v. Davis* should not be interpreted otherwise. One might almost conclude that because the Court was aware that plaintiffs' rights in employment discrimination cases could effectively be vindicated under Title VII, there would be no reason to risk extending constitutional doctrines, which might have unforeseen implications, into other areas.[8]

Although I have just indicated that the Supreme Court has not repudiated its basic holdings in *Griggs* and *Albemarle*, and has evidenced an intent to continue to enforce the anti-discrimination standards of Title VII, these conclusions should be qualified by a realization that the Court is likely to be somewhat more "flexible" in its application of Title VII standards and the EEOC guidelines in future cases. A number of the justices, including Chief Justice Burger, as expressed in his dissenting opinion in the *Albemarle* case, have apparently been unhappy with what he termed the majority's "wooden application" of the EEOC guidelines. Although other justices have indicated a stronger commitment to direct application of all the EEOC standards, the result of this "tug of war" among the members of the Supreme Court is likely to be continued application of the basic EEOC principles, but with nuances of looser enforcement on specific points. Such was the Court's attitude in the *Gilbert* case, cited above, where Justice Rehnquist, writing for the majority, seized on earlier inconsistent pronouncements by the EEOC as a basis for refusing to apply present guideline standards on pregnancy disability benefits.

A further specific illustration of the Court's flexible approach is provided by the Court's handling of the validation issues in the *Washington* case itself. The plaintiffs in *Washington* were Black applicants for positions as police officers in the District of Columbia. They claimed that a general Civil Service examination, "Test 21," used to measure verbal skill, had not been validated in accordance with EEOC guidelines and had not been shown to bear a demonstrable relationship to the actual requirements of a police officer's job. The lower federal court, finding adverse impact (but also noting that significant affirmative efforts had been made to recruit minority applicants) and believing that a reasonable level of validation must be shown, thought it sufficient that Test 21 "directly related to the determination of whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy."[9] The Court of Appeals reversed this decision because it believed that Title VII standards were applicable and that these standards required a showing that the test was validated in terms of the actual on-the-job requirements, rather than validation in terms of successful completion of the training course. (In other words, success in an unvalidated training program may not be a valid prediction of success on the job.)

The Supreme Court, having rejected the applicability of Title VII and EEOC guideline standards to the case, believed that certain Civil Service Commission regulations should be the appropriate validation guidelines for the non-constitutional aspects of the case. The Court interpreted these regulations as permitting "training course" validation, rather than the more rigorous "job-related" approach of the EEOC guidelines. The Court also

appeared to be impressed by the "common sense" relationship of a minimum standard of literacy to a policeman's duties. In addition, as Justice Stevens pointed out in his concurring opinion, the subject matter of the case, the qualifications of law enforcement officials, "is one in which the federal district judges have a greater expertise than in many others."

In sum, then, although the Supreme Court went out of its way to say that Title VII standards were not being applied or interpreted in *Washington*, its "common sense" approach, at least in the case of police officers, may be a harbinger of "common sense" application of general standards of the EEOC guidelines, rather than their specific detailed requirements, in future Title VII cases.[10]

The New Federal Executive Agency Guidelines and Their Applicability to Licensing and Certification Boards

As indicated above, a number of employment discrimination cases over the last decade have invalidated employee selection practices of local school boards and of local licensing agencies, like the Board of Examiners of the City of New York. Based on these precedents, it is reasonable to assume that, directly or indirectly, the validation requirements upheld in these cases would also be applied to state-wide licensing and certification practices.

The broad definition of the word "test" in the EEOC guidelines, which covers all formal and informal measures of assessing job suitability, including "specific educational . . . requirements," appear to apply to state certification standards, which are the first level of employment eligibility assessment for the teaching profession. However, questions had arisen in certain recent cases as to whether a state board of education or a state licensing agency could be subject to Title VII, because these agencies are not technically "employers" as defined under the Act. The Justice Department has consistently ruled that licensing authorities are covered under Title VII, and at least one Court had indicated a legal basis for liberally interpreting the concept of "employer" in the certification context.[11] However, another Court, in a case involving a challenge to a state bar examination, specifically held that Title VII was not applicable to a state licensing board.[12]

The applicability of Title VII to state licensing agencies still has not been definitively resolved by the courts. Yet the federal executive agencies responsible for enforcement of many of the equal employment opportunity laws have recently clarified and emphasized their understanding that Title VII (as well as the general antidiscrimination standards of Title VI of the 1964 Civil Rights Act, the Intergovernmental Personnel Act of 1970 and other such laws) does directly apply to state licensing and credentialling boards. Thus, despite vigorous opposition by Educational Testing Service (ETS) and other groups, the new Federal Executive Agency Guidelines, adopted in November by the Justice Department, the Department of Labor, and the Federal Civil Service Commission, specifically have been made to apply to "licensing and certification boards in complying with equal employment opportunity requirements of federal law. . . ." For all immediate practical

purposes, then, licensing authorities should assume that they will be held accountable for compliance with these laws.

The Federal Executive Agency Guidelines, just mentioned, are important for our purposes not only because of their clarification of the applicability of Title VII and related laws to licensing boards, but also because of the interesting difference between these guidelines and the pre-existing EEOC guidelines on a number of points. These guidelines originated with the Equal Employment Opportunity Coordinating Council, an inter-agency body consisting of the three federal agencies named above plus the Civil Rights Commission and the EEOC. The Council was established by law to attempt to devise uniform guidelines adoptable by all federal agencies involved in enforcing equal employment opportunity laws.

Although EEOC is a constituent member of the Council, it apparently has been dissatisfied with the positions taken by the other members in various drafts of proposed new guidelines, and it has gone on record as specifically opposing them. To emphasize its separate position, EEOC formally republished its own guidelines November 24, 1976, the day after the other federal agencies adopted and published their proposals in final form. The reason for EEOC's dissatisfaction with the new approach appears to be simply that the new guidelines are more "flexible" than the standards enforced by EEOC.

Without attempting to analyze the new executive agency guidelines in detail, a few indications of their "flexibility" are: acceptance of the equivalence of several validation models, in contrast to the EEOC guidelines' stated preference for predictive validation; a focus on the impact of the totality, rather than individual segments, of the selection process; a less rigorous definition of "adverse impact;" and general indications that the guidelines principles are designed to assist employers rather than to hold them responsible for explicit compliance in all cases.

Let me try to illustrate the difference between executive agency and EEOC approaches by reference to a specific issue which is of great relevance to teacher education, i.e., use of job descriptions or job analyses in content validation. Under the EEOC guidelines, content validation might be utilized where it could be shown that predictive validation was "not feasible." In order to establish content validation, an employer who, for example, utilized a written examination, would need to show that the questions on the examination were directly related to the specific aspects and requirements of the job itself as revealed by a job analysis. An adequate job analysis should be based on an empirical evaluation showing what specific duties are performed on the job, how they are done, the relative importance or frequency of the specific tasks, the level of skill and responsibility necessary for each task, etc.

The difficulties of composing an adequate empirical job analysis are illustrated by the recent developments in the long-pending case of *Chance v. Board of Examiners.*[13] Acting under court order, after it had been accepted that the old licensing examination for supervisors did not meet validation requirements, the New York City Board of Education spent a large amount of money hiring an outside consulting firm to conduct an empirical job analysis. After a year of study and investigation, the consultants presented a report which the plaintiffs challenged as being inadequate. The Board of Education

itself finally became convinced of the validity of the plaintiffs' claims; and it, therefore, agreed to set aside the consultants' report and entered into a stipulation for a new on-the-job evaluation system that would obviate the need to try to conduct another system-wide job analysis.

Under the new executive agency guidelines, content validation is considered a suitable alternative validation standard, apparently even if predictive validation is "feasible." The content validation standards may be based on job analyses, as under EEOC standards, but significantly, executive agencies also accept as an alternative basis for content validation "the pooled judgments of persons having knowledge of the job." Thus, whereas under EEOC guidelines it would appear that content validation of teacher licensing tests or standards would need to be justified in terms of an empirical job analysis, under the executive agency rules, in appropriate circumstances, a bona fide articulation of job components by a group or a consortium of knowledgeable and experienced experts in the field may be a satisfactory alternative.[14]

The new approach of the executive agency guidelines parallels the new "flexible" direction adopted by the U.S. Supreme Court in *Washington v. Davis*. Interestingly, the specific issue which concerned the Court in *Washington*—i.e., validation by reference to success in a training course—is given approval, under certain circumstances (which are, nevertheless, apparently more stringent than the circumstances permitted by the Supreme Court in *Washington*) in the executive agency guidelines. Thus, despite EEOC's continued adherence to its more rigorous standards, the trend seems clear. One might expect that with the availability of the executive agency guidelines as a reference point, the courts will become increasingly "flexible" in applying Title VII and the EEOC guidelines, even in instances where these guidelines, rather than the executive agency standards, might directly apply.[15]

"Rational Relationship" and the NTE Cases

The preceding discussion has explained the reasons why licensing and credentialling authorities will be required to justify their actions in situations where members of minority groups can claim that they have suffered discrimination. Licensing officials should assume, at least for the present, that the distinction between discriminatory "intent" and discriminatory "impact," established by the Supreme Court in the *Washington* case, will be of little relevance in cases brought against them under Title VII or under the executive agency guidelines, and that "adverse impact" will be the applicable definition of discrimination. But licensing authorities also should be concerned with whether the validation standards will be applied even in the wider potential pool of cases where there are no allegations, or no proof, of discriminatory impact against minority groups.

There is no doubt that the validation standards of the EEOC and the executive agencies apply directly only in cases involving findings of discrimination against minority groups. However, the fact that for the past five or six years the courts have involved themselves in detailed analyses of reasonable standards for assessing job relatedness, and have become educated in psychometric approaches to assessing job competence, is highly significant. Given this background, one cannot assume that the courts would refuse to

consider a plausible challenge to an irrational licensing or credentialling system merely because the plaintiff is not a member of a minority group or has not statistically established discriminatory impact. Ten or 15 years ago, a case attacking the irrationality of licensing systems probably would have been dismissed out of hand because the accepted legal doctrines of due process and equal protection would not permit a court to examine closely the substantive licensing standards that state officials, who are presumed to be experts in the field, had established. But developments in equal opportunity employment law have now given the courts explicit tools which enable them to delve intelligently into these questions and to require state officials to defend the substance of their programs.

I have written elsewhere about the trend toward an emerging middle ground on "revitalization" of the traditional rational relationship test employed by the courts in equal protection cases. Also, courts have indicated they will give increased level of substantive review to equal protection claims concerning employment selection and licensing issues, even if discrimination against protected minority groups is not shown.[16] I will not attempt to repeat here the specifics of that discussion. Instead, I would like to illustrate this basic theme, and at the same time briefly focus on a line of cases which have raised interpretive questions in the educational community, by discussing the recent decision of the federal district court for the Northern District of Georgia in the case of *Georgia Association of Educators v. Nix.*[17]

The Georgia case is the latest in a long series of court decisions which have invalidated the use of the National Teachers Examination (NTE) as an employment selection device. In a number of earlier cases[18] the courts had invalidated requirements that applicants for teaching positions obtain a cut-off level score on the NTE "common" or "teaching area" examinations, or on both. The courts had held that the NTE was established for the purpose of measuring the knowledge obtained by graduates of teacher training programs, but that it had not been validated in terms of actual on-the-job requirements of teaching functions, and it apparently did not measure important job-related skills such as teaching attitude, personal characteristics, or classroom performance. An important point in all these cases was that the agency which created and administers the NTE, the Educational Testing Service, has consistently testified that use of the NTE as a employee selection device, with a cut-off score, was in direct violation of ETS's own guidelines for appropriate use of the test.

As one might assume from the fact that the NTE cases emerged either from states in the deep South or from racially troubled Boston, allegations of racially discriminatory motives were in the background in most of these litigations. Findings of racially discriminatory intent or adverse impact appear in some of the decisions, but, their over-all thrust can be said to be an insistence that the application of the NTE under the circumstances is patently arbitrary and irrational. In other words, there is no reason to assume that a different standard would be applied or a different conclusion reached if the plaintiffs in these cases had not been Blacks or members of other minority groups. Such is precisely the court's holding in the *Georgia Association* case.

> As noted above, the plaintiffs' first contention is that the application of the NTE score requirement is racially discriminatory. After considering the stipulated

> facts of record, this court is of the opinion that there is no need to consider this contention because, without ever reaching the question of the racial discriminatory nature of the use of the NTE in the six year certification process, the defendants' use of the NTE can readily be found to be violative of equal protection under the traditional analysis as establishing a classification which is arbitrary in that it is not rationally related to the purpose for which it is designed.[49]

Interestingly, the facts in the Georgia case did not involve use of the NTE as an exclusive selection device. Rather, the issue in the case was a requirement that in order to obtain a "six year certificate" entitling a teacher to higher pay, the teacher had to establish, among other things, that he/she had completed a specified post-graduate course of study and had achieved a composite score of 1225 on the commons and specialized teaching area portions of the NTE, or that he/she had been accepted to a doctoral degree program. Noting that the NTE is designed to test knowledge gained at the college level, the Court held that the NTE was not shown to have tested knowledge gained in post-graduate work, nor was it shown to be related to evaluating a teacher's past performance in order to determine "master teacher" status and entitlement to higher salary level. The fact that admission to a doctoral program provided an alternative method for obtaining the six-year certificate was held by the Court to be irrelevant to the basic fact that use of the NTE here would be arbitrary and would totally exclude some candidates. The Court also rejected defendants' argument that because the NTE criterion was not an exclusive job requirement, as in some of the previous cases, but was one of several qualifications that had to be established, its use should not be considered objectionable. On this point, the Georgia Court distinguished the case of *Lee v. Macon County Board of Education*,[50] where the Court had upheld use of the NTE as one variable to be assessed in relation to other factors, because, unlike the situation in *Lee*, the NTE was utilized in this instance on an absolute cut-off basis.

The consistent invalidation of the NTE examination as an exclusive employment selection or promotion measure by the courts over the course of the past five years is of great significance to those concerned with the general problem of teacher certification. The NTE, as a measure of the knowledge students have gained in teacher training institutions, is analogous to many teacher credentialling laws based on the "approved program" approach, an approach which also basically measures the knowledge that students have gained at teacher training institutions. Therefore, it would seem that program approval certification requirements or certification examinations which test knowledge gained in teacher colleges and which deny licenses to those who fail to achieve a requisite "cut-off" score would be in jeopardy of invalidation under the NTE precedents if they cannot be shown to be job-related.[51]

In recent years, many states have amended their teacher certification regulations to permit or require a competency-based teacher education (CBTE) orientation in the approved program credentialling practices. To the extent CBTE achieves its goal of incorporating into teacher training institution curriculum and evaluation standards the actual knowledge and attributes needed by the practitioner on the job, it would seem to satisfy applicable validation standards. Unlike the situation in the NTE cases, credentialling

based on CBTE presumably could be said to be designed for the purpose for which it is being used. It probably would be easier to justify a cut-off score if the CBTE certification is based on a minimum proficiency standard which is directly related to the competencies that are being measured.

Let me caution, however, that although, in theory, CBTE by definition conforms to the job-related validation standards, so far, in practice, CBTE is far from achieving its stated goals. Whether any actual competency-based program would pass muster under judicial review is a question that cannot, of course, be answered in the abstract without analyzing the specific details of the particular program. Although I have stated that recent legal developments indicate that predictive validation of credentialling requirements may not need to be established, and that content validation standards will be applied more flexibly, designers of CBTE programs would still be well-advised to substantiate carefully the job-relatedness of each component of their program. Although the new executive agency guidelines may dispense with empirical analysis under some circumstances, I would think that CBTE, as an innovative reform (and as an inherent critique of traditional credentialling practices), would need to empirically analyze the teachers' duties on the job (at least initially) in order to plausibly define its competencies. Furthermore, great care must be given to the objectivity of the ratings and evaluation criteria utilized by instructors and supervisors in CBTE programs.[22]

In conclusion, it is fair to say that increasingly the courts will be looking over the shoulders of those involved in the teacher credentialling process; but that in reviewing credentialling practices, judges are likely to be doing no more than requiring adherence to the reform principles that advocates of CBTE have established for themselves. A licensing examination which would penalize applicants for school principal positions for not knowing whether "Nanki Poo, Pish Tush, Ko-Ko or Poo Bah" sang the song, "I've Got a Little List," from the *Mikado*[23] would undoubtedly still be invalidated by the Courts, but a credentialling process which fairly measured basic knowledge and skills reasonably shown to be related to the job at issue should pass muster with the Court.

Footnotes

1. See: Study Commission on Undergraduate Education and the Education of Teachers, *Teacher Credentialling Reform in New York State: A Critique and a Suggestion for New Directions* (Lincoln: University of Nebraska, 1974); _____, "The Law, the Courts, and Teacher Credentialling Reform" in Levitov, ed., *Licensing and Accreditation in Education* (Lincoln: University of Nebraska, 1976); "Court Decisions Affecting Teacher Evaluation" in Doty, Gepner, eds., *Post Secondary Personnel Development* (New Jersey Department of Education, Division of Vocational Education, 1976).
2. Construct validation, referring to a correlation between specific physical or mental traits needed for a particular job and a test measuring those traits, is also mentioned in the guidelines, but this relatively esoteric category need not be considered for purposes of the present discussion.
3. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975).
4. The prevalence of this reasoning is indicated by the fact that at least a dozen federal district and appellate courts accepted the logic of incorporating indirectly

the EEOC guidelines and Title VII standards in constitutional cases; and to my knowledge only one court, the Court of Appeals for the Fifth Circuit, rejected this reasoning. See *Tyler v. Vickery*, 517 F 2d 1089 (1975).

5. *Washington v. Davis*, 426 U.S. 229 (June 7, 1976).
6. Ibid.
7. For a detailed discussion of how discriminatory intent is to be determined in light of *Washington*, and the continued relevance of impact as a possible measure of intent, see *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4075 (January 11, 1977).
8. Although nothing in *Washington v. Davis*, *Griggs*, or the other cases discussed above appears to provide any direct basis for the argument, appellants in *Hazelwood School District v. United States*, 534 F. 2d 805 (8th Cir., 1976), have raised in their pending appeal to the Supreme Court the question whether the Fourteenth Amendment will permit Congress to apply the adverse impact standard of Title VII to a state agency in the absence of a showing of discriminatory intent. A favorable ruling for the appellants on this point would, in effect, extend the holding in *Washington v. Davis* to all cases brought against governmental agencies, whether under the Constitution or under Title VII.
9. *Washington v. Davis*, op. cit.
10. Justice White, in his majority opinion in *Washington*, cited the EEOC guidelines at one point (somewhat out of context) and noted that the conclusion concerning training program validation is not "foreclosed" by either *Griggs* or *Albemarle*.
11. *United States v. State of North Carolina*, 400 F Supp. 343 (E.D.N. Car., 1975).
12. *Tyler v. Vickery*, 517 F. 2d 1089 (5th Cir., 1975).
13. *Chance v. Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y., 1971) aff'd 458 F. 2d 1167 (2d Cir., 1972).
14. I would hasten to add, however, that "the pooled judgments" would need to be shown and justified; and one could reasonably assume that these judgments would have to be based on objective knowledge rather than subjective impressions, and that due consideration would still need to be given to detailed analysis of definition of the job elements, the approximate relative frequency and importance of the tasks, the specific skills required for each task—and the direct relationship between the job descriptions and the examination questions. (See, generally: "Questions and Answers on the Federal Executive Agency Guidelines on Employee Selection Procedures," 42 Fed. Regis. 3820 (Jan. 19, 1977). See, also, the discussion concerning content validation standards in my article in Levitov, *supra*.)
15. I will not attempt to discuss here the complex, and as yet unresolved, question as to when the EEOC, rather than the executive agency, guidelines might directly apply.
16. See the discussions in the articles cited in footnote 1, *supra*; see also, the recent articulation of this interpretation in *Douglas v. Hampton*, 512 F. 2d 976, 989-90 (D.C. Cir., 1975); cf. *Smith v. Troyans*, 520 F. 2d 492 (6th Cir., 1975). "Questions and Answers," *supra* 42 Fed. Regis. 3820, 3822, 16 (January 19, 1977).
17. *Georgia Association of Educators v. Nix*, 407 F. Supp. 1102 (1976).
18. *Baker v. Columbus Municipal School District*, 329 F. Supp. 706 (N.D. Miss., 1971) aff'd 462 F. 2d 1112 (5th Cir., 1972); *U.S. v. Nansemond County School Board*, 492 F. 2d 919 (4th Cir., 1974); *U.S. v. State of North Carolina*, 400 F. Supp. 343 (E.D., N. Car., 1975); *Morgan v. Kerrigan*, 509 F. 2d 580, 597 (1st Cir., 1974). See, also, *Armstead v. Starkville Municipal Separate School District*, 325 F. Supp. 560 (W.D. Miss., 1971), aff'd 461 F. 2d 276 (5th Cir., 1972)

(invalidation of graduate record exam as employment selection device).

19. *Georgia v. Nix*, op. cit.

20. *Lee v. Macon County Board of Education*, 463 F. 2d 1174 (5th Cir., 1972).

21. At first glance, the U.S. Supreme Court's decision in *Washington v. Davis*, which upheld the use of a training program validation, would seem to undercut the holdings in the NAE cases, which also might be said to basically involve a "training program validation." Leaving aside the fact that the Supreme Court was applying guidelines which were even more "flexible" than the new executive agency standards, the analogy here really would be to admission standards for college entrance, rather than to credentialling upon graduation. If job selection is to occur after "training," presumably it should be based on job-related criteria.

    Application by analogy of the Supreme Court's "common sense" finding in *Washington* that, even without specific job validation, it would be reasonable to require minimum communicative ability from prospective policemen, might permit a state to require a minimal level of subject matter competence of those seeking teacher credentialling. But this does not mean that criteria testing of other specific skills on a cut-off basis would be upheld if the selection standards have not been shown to be directly related to the job at issue. (See the discussion on subject matter certification in Appendix B to my monograph on "Teacher Credentialling Reform in New York State," cited in footnote 1, *supra*.)

22. See, e.g., *Albemarle Paper Company v. Moody*, *supra*; and *United States v. Hazlewood School District*, 534 F. 2d 805, 813 (8th Cir., 1976).

23. See *Chance v. Board of Examiners*, *supra*, 330 F. Supp. at 220.